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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JANETTE NOLASCO et al.,

Plaintiffs and Respondents,

v.

SCANTIBODIES LABORATORY, INC.,

Defendant and Appellant.

D073157

(Super. Ct. No. 37-2014-0004716)

APPEAL from an order of the Superior Court of San Diego County, Gregory W. Pollack, Judge. Affirmed.

Niddrie Addams Fuller Singh and David A. Niddrie for Defendant and Appellant.

Letizia Law Firm and Clarice J. Letizia for Plaintiffs and Respondents.

Plaintiffs Janette Nolasco and Brenda Taylor (Plaintiffs) sued defendant Scantibodies Laboratory, Inc. (Scantibodies), for retaliation under California Labor Code section 1102.5. Their complaint included a claim under Labor Code section 2699, the Private Attorney General Act of 2004 (PAGA). The Labor Code section 1102.5 claims

were tried to a jury, and the jury found Scantibodies liable for retaliation. The trial court awarded Code of Civil Procedure section 1032 costs to Plaintiffs.¹

In a separate appeal, Scantibodies appealed from the judgment, and we affirmed. (*Nolasco v. Scantibodies Laboratory, Inc.* (Feb. 26, 2019, D071923) [nonpub. opn.].) Here, Scantibodies appeals from the award of costs to Plaintiffs, contending their costs request was untimely and relief was unwarranted. Plaintiffs maintain that granting relief was within the court's discretion. Although it is a close question, we conclude the trial court acted within the scope of its broad discretion, and we therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' complaint included claims under Labor Code section 1102.5 and for PAGA penalties, fees, and costs. The case proceeded to a jury trial on the Labor Code section 1102.5 claims. PAGA was mentioned only once and was not on the verdict form. The jury found Plaintiffs established their retaliation claims and, following posttrial motions, the trial court entered judgment in December 2016. The judgment provided "plaintiffs shall recover . . . costs[] pursuant to *Code of Civil Procedure (CCP)* [section] 1032, in the amount of ____." The judgment then provided, "In addition, . . . plaintiffs may recover . . . attorney's fees and such other costs not including those awarded under [Code of Civil Procedure section] 1032, if any, in the amount of ____, and civil penalties,

¹ This statute provides that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).) Further statutory references are to the Code of Civil Procedure unless otherwise noted.

if any, in the amount of ____ pursuant to *Labor Code* [section] 1102.5[, subdivision] (f), [section] 2699 and [section] 2699.5."

Plaintiffs served notice of entry of judgment on January 9, 2017 (subsequent dates are in 2017). This notice triggered the 15-day deadline for a memorandum of costs under California Rules of Court, rule 3.1700(a)(1)² (Jan. 24; or Jan. 29 with five-day extension for mail service) and the 60-day deadline for a motion for statutory attorney's fees under rule 3.1702(b)(1) (Mar. 10).

On February 16, Scantibodies appealed from the judgment. On March 10, Plaintiffs' counsel applied for an ex parte hearing on March 13, in order to extend time for a fees motion. Counsel explained she erroneously assumed the February 16 notice of appeal stayed trial court proceedings. She further explained that "in consulting with appellate counsel" on March 7, she learned the notice of appeal did not stay trial court proceedings with respect to the fees motion and the deadline was still March 10. She indicated defense counsel declined to stipulate to extend the March 10 deadline and she was unable to get an ex parte appearance on March 9 because of the court's calendar.

At the ex parte hearing on March 13, Plaintiffs' counsel agreed this was a "request to continue the time . . . to file a motion for prevailing party attorney's fees." She noted, "The only reason we pled a PAGA claim in our complaint was for attorney's fees and costs pursuant to 1102.5. . . ." The court's minute order stated:

² Further rule references are to the California Rules of Court. The parties disagree on whether the 15-day deadline ends January 24 or January 29, but that dispute is not material to our resolution of the appeal and we need not resolve it.

"[T]he Court finds that if Plaintiff[s] file attorneys' fees motion on or before April 21, 2017, it will be deemed filed nunc pro tunc on March 13, 2017. Plaintiff[s] can address CCP section 473/leave of court to extend deadline issues within their moving papers."

On April 21, Plaintiffs filed their motion for fees and costs, stating it was based on, among other things, "the memorandum of costs." They also said the motion was "deemed to be filed nunc pro tunc on March 13," citing the minute order. Plaintiffs contended the court "ha[d] the power under [section] 473(b) to allow an untimely motion for attorney fees" and requested it grant relief for the same reasons as set forth in the ex parte application (counsel's belief the notice of appeal stayed all trial court proceedings). With respect to the merits, they argued they were entitled to fees and costs under Labor Code section 2699. They also argued "[section] 1032[, subdivision] (b) provides that . . . an award of costs to a party is mandatory . . . if the party qualifies as the prevailing party" Plaintiffs' counsel's declaration attached a memorandum of costs (for \$75,631.59), but indicated they were claiming costs under Labor Code section 2699 and the memorandum was submitted for the purpose of comparing costs spent with those allowed. Plaintiffs subsequently filed multiple errata for the fee motion.

Scantibodies filed its opposition on July 10. Scantibodies argued the request for costs was late and did not have a "proper memorandum of costs"; Plaintiffs did not explain the delay; and the delay was inexcusable.

In their reply brief, filed on July 14, Plaintiffs argued the trial court had discretion under Code of Civil Procedure section 473 "to relieve [them] of the late filing of a memorandum of costs. . . ." They contended they "claim[ed] costs pursuant to Labor

Code [section] 2699, many of which are not on the Memorandum of Costs form and require the court's discretion." They further contended "[a] cost memorandum was filed as an [e]xhibit to the fee motion, which motion sought relief based on [Code of Civil Procedure section] 473, for plaintiffs' counsel's incorrect assumption that upon the filing of a Notice of Appeal by defendants, the trial court lost jurisdiction." (Italics omitted.)

The trial court heard the motion on July 21. The court granted relief under section 473 and denied the motion on the merits, holding in part that the PAGA claim was abandoned and not tried.³ On section 1032 costs, the court stated: "You [Plaintiffs' counsel] filed a 1032 Memorandum of Costs. You need to file the backup documents. . . . Get it over to [defense counsel]. [Defense counsel], you will then have an opportunity to look at it and see if there is any fat. Then we can schedule a hearing on this." Defense counsel raised timeliness. The court indicated it would set briefing on whether it had authority to allow "leave to file something several months late when . . . the assumption was that costs would simply be dealt with in the PAGA motion," and that it would look at the case law. The court later phrased the question as whether March 10 was "so far out that [it] no longer ha[d] discretion."

The trial court's minute order explained the basis for allowing Plaintiffs to file an untimely PAGA fees and costs motion. It indicated the motion was one business day late, and found this delay "arose from plaintiffs' counsel's misunderstanding of the law,

³ We address the Court's PAGA rulings in a related appeal. (*Nolasco v. Scantibodies Laboratory, Inc.* (Feb. 26, 2019, D072945) [nonpub. opn.])

further complicated by (1) the unavailability of ex parte hours . . . , and (2) defendants' unwillingness to stipulate" The order also set a hearing on section 1032 costs for September 8.

On August 16, Plaintiffs served and filed their motion to determine prevailing party costs. The motion was "made pursuant to [sections] 1032 and 1033.5, and on the further grounds that [the] Court ruled, on July 21, 2017, that plaintiffs were relieved of the late filing of the Memorandum of Costs, pursuant to [section] 473, and that plaintiffs should file another Memorandum with the worksheet and invoices attached, to give defendant the opportunity to move to tax costs" Plaintiffs concurrently filed a memorandum of costs and worksheet, with supporting documentation. The memorandum requested different amounts for certain costs, and a different overall amount (\$75,612.89).

Scantibodies opposed the motion on August 25, contending in part that Plaintiffs' electronic service was untimely under section 1005; they "apparently assum[ed] that they are entitled to relief under Section 473 [and] did not file the required motion for relief"; and they did not explain how the failure to timely seek costs was excusable.

In their August 31 reply, Plaintiffs argued the motion was timely; the "[section] 473 motion [had] already been decided"; "[t]he only thing further that this court agreed to 'look at,' were the cases that had already been cited by [P]laintiffs and defendant in their briefs on the Fee and Cost Motion"; and those cases supported relief.

On September 8, the trial court heard and granted the costs motion. The minute order stated, in pertinent part:

"The court finds that [P]laintiffs' delay in filing their memorandum of costs was the result of excusable neglect or mistake on the part of their attorney. Plaintiffs' PAGA attorney's fees motion, which was 'deemed filed' by this court on March 13, 2017, was required to be filed 60 days (not 15 days) after service of notice of entry of judgment pursuant to [rules] 3.1702(b) and 8.104(a). Because that PAGA statute, Labor Code [section] 2699[, subdivision] (g)(1), provides for both 'reasonable attorney's fees and costs,' plaintiffs' attorney reasonably believed that the filing of her PAGA fee motion would encompass her [section] 1032 ordinary costs as well. (Indeed, in *Kaufman v. Diskeeper Corporation* (2014) 229 Cal.App.4th 1, 9-10, the court held that the time requirement for filing a memorandum of costs need not be followed where the prevailing party brings an attorney's fees motion governed by a longer time requirement.) While plaintiffs did file their motion one business day late, such was found to be excusable for the reasons outlined within this court's minute order of July 21, 2017. The same analysis applies to plaintiffs' memorandum of costs, which this court finds deemed filed as of March 13, 2017, and, pursuant to [section] 473, viable for the court's below substantive consideration."

Scantibodies timely appealed.

DISCUSSION

I

Applicable law

A prevailing party generally is "entitled as a matter of right to recover costs" (§ 1032, subd. (b).) "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment or dismissal by the clerk under . . . section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." (Rule 3.1700(a)(1).) "The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory." (*Hydratec*,

Inc. v. Sun Valley 260 Orchard & Vineyard Co. (1990) 223 Cal.App.3d 924, 929
(*Hydratec*).)

Rule 3.1702 "applies in civil cases to claims for statutory attorney's fees and claims for attorney's fees provided for in a contract." (Rule 3.1702(a).) The fees motion must be filed "within the time for filing a notice of appeal"; i.e., 60 days after notice of entry of judgment, or 180 days after entry of judgment, whichever is earliest.
(Rule 3.1702(b)(1).)

Under PAGA, "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs" (Lab. Code, § 2699, subd. (g); *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 578 ["If an employee prevails in a PAGA action, he or she is entitled to an award of reasonable attorney fees and costs."].)⁴

Pursuant to section 473, "a superior court may grant relief to a party where through mistake, inadvertence or excusable neglect a memorandum of costs has not been filed within the statutory period." (*Rio Vista Gas Assn v. State of California* (1961) 188 Cal.App.2d 555, 565.) "The party seeking relief under section 473 must also be diligent. [Citation.] Thus, an application for relief must be made 'within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding

⁴ We omit the full text of Labor Code section 2699, subdivision (g), as it is not pertinent here. We take no position on the requirements for PAGA fees in this opinion.

was taken.' " (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (*Zamora*), quoting § 473, subd. (b).)

We review a court order granting or denying relief under section 473, subdivision (b) for abuse of discretion. (See *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 381 (*Pollard*); *Hoover Community Hotel Development Corp. v. Thomson* (1985) 168 Cal.App.3d 485, 488 (*Hoover*) ["[A] trial court has broad discretion in allowing relief from a late filing where . . . there is an absence of a showing of prejudice to the opposing party."]; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 (*Shamblin*) ["The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason."].)⁵

II

Analysis

A. The Trial Court Had Authority to Award Costs

Scantibodies argues the trial court lacked authority to award costs because Plaintiffs requested relief beyond the six-month period required under section 473, and because relief was not authorized under rule 3.1700(a)(1). Neither argument supports Scantibodies's position that the court lacked jurisdiction to award costs here.

⁵ Scantibodies contends that where applicability of section 473 turns on undisputed facts, de novo review applies, citing *Gee v. Greyhound Lines, Inc.* (2016) 6 Cal.App.5th 477, 485. That case was applying the mandatory relief provision of section 473. (*Gee*, at p. 485.) Discretionary relief is at issue here.

An application for relief under section 473, subdivision (b) must be made within six months " 'after the judgment, dismissal, order, or proceeding was taken.' " (*Zamora, supra*, 28 Cal.4th at p. 258, quoting § 473, subd. (b).) Scantibodies contends Plaintiffs did not seek relief for the late memorandum of costs until August 2017, approximately seven months after it was due. However, Scantibodies is incorrect to focus on the period from January through August. "[T]he courts have consistently found . . . the six-month period in which a trial court is empowered to act [under section 473] commences to run[] when a procedural time limit is raised as an objection by an adversary or is in some manner enforced by the trial court." (*Save Our Forest & Ranchlands v. County of San Diego* (1996) 50 Cal.App.4th 1757, 1770.) Plaintiffs' counsel learned the notice of appeal did not stay proceedings on the fee motion on March 7, sought ex parte relief on March 10, and filed the PAGA fees and costs motion on April 21 (deemed filed on March 13), in which they sought section 473 relief for that motion. Their counsel then learned they had to file a costs memorandum from Scantibodies's July 10 opposition, contended they were entitled to section 473 relief for their costs memorandum in their July 14 reply, and further briefed the issue in their August 31 reply for their section 1032 costs motion. Under *Save Our Forest & Ranchlands*, we look to July 10 to determine whether Plaintiffs' request was timely, when Scantibodies first objected to Plaintiffs' failure to file a memorandum of costs. Because Plaintiffs pursued relief four days later, their section 473 request was timely brought within six months.

We also reject Scantibodies's claims based on rule 3.1700. Scantibodies contends the memorandum of costs was untimely under rule 3.1700(a)(1); the time to file was

never extended by the trial court under rule 3.1700(b); and the court lacked authority to accept the memorandum after the deadline. As Scantibodies itself acknowledges, however, the time limit under rule 3.1700(a)(1) is not jurisdictional (*Hydratec, supra*, 223 Cal.App.3d at p. 929). In any event, no extension was requested or granted here pursuant to rule 3.1700, and the court was authorized to consider the Plaintiffs' request for relief under section 473.

B. The Trial Court Did Not Abuse Its Discretion

Absent prejudice, the court had broad discretion to grant relief under section 473. Scantibodies contends it was prejudiced by Plaintiffs' delay, citing the accrual of interest from the entry of judgment and having "less than 10 days" to assess costs (rather than the 15 days available under rule 3.1700(b) to tax costs). The trial court acknowledged interest was accruing, but nevertheless found there was no prejudice. Scantibodies's arguments do not establish this finding was in error. First, although it was Plaintiffs who initially delayed in seeking costs, both parties heavily litigated the issue over several months. Second, Scantibodies does not establish it had insufficient time to assess Plaintiffs' requested costs. The "10 days" appears to refer to the time between Plaintiffs' costs motion on August 16 and their opposition on August 25. But Scantibodies knew Plaintiffs were seeking section 1032 costs no later than July 2017; it had their costs attachment from April 2017; and it does not contend the costs memorandum filed in

August 2017 reflected material differences. Scantibodies proceeded to file its opposition, and the trial court reduced the claimed costs after considering Scantibodies's objections.⁶

We now turn to excusable neglect. In determining whether an "attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent person under the same or similar circumstances" might have made the same error.' " (*Zamora*, *supra*, 28 Cal.4th at p. 258, italics omitted.) " "The controlling factors in determining whether an attorney's mistake was excusable are (1) the reasonableness of the misconception and (2) the justifiability of the failure to determine the correct law." (*McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, 360 (*McCormick*); *id.* at p. 361 [court must consider "overall diligence in prosecuting the case"].)

Here, the trial court determined the late filing of Plaintiffs' costs memorandum was excusable because of counsel's (1) assumption that section 1032 costs could be pursued in a PAGA motion; and (2) misunderstanding of the impact of the appeal, complicated by the unavailability of ex parte hours and Scantibodies's unwillingness to stipulate. Applying a deferential standard of review, as we must, we cannot conclude the court exceeded all bounds of reason based on its evaluation of the circumstances. (*Shamblin*, *supra*, 44 Cal.3d at p. 478.)

⁶ Scantibodies raises other points on reply, including that Plaintiffs ignore "the thousands of dollars in attorneys fees and hundreds of hours spent" on the cost proceedings. We need not address arguments raised on reply and without record citations. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [points raised on reply ordinarily not considered]; *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 [counsel has duty to identify record support].)

Plaintiffs pled a PAGA cause of action and—regardless of their efforts to try that claim (or lack thereof)—the judgment allowed for potential recovery of costs under both section 1032 and PAGA. Counsel indicated she did not file a costs memorandum sooner because she assumed she could seek costs in the PAGA motion, and the trial court found that claim credible. (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 24 ["factual findings in the exercise of that discretion (under § 473) are entitled to deference"].) Plaintiffs identified cases that purportedly supported their approach, and the trial court found one persuasive enough to cite it. (See *Kaufman*, *supra*, 229 Cal.App.4th at pp. 9-10.) Scantibodies maintains that a costs memorandum is necessary under PAGA, but it does not provide authority for such a requirement.⁷ Given these circumstances, we conclude the trial court did not abuse its discretion in finding Plaintiffs' attempt to seek section 1032 costs via their PAGA motion was reasonable.

Counsel's erroneous belief that the notice of appeal stayed proceedings relating to her fees and costs request likely would be unreasonable in isolation—it is not complex or debatable (*McCormick*, *supra*, 198 Cal.App.3d at p. 360), and elementary legal research

⁷ Scantibodies cites one unpublished federal case that suggests, but does not rule, a memorandum is required. (*Fleming v. Covidien, Inc.* (C.D.Cal. 2011) 2011 U.S. Dist. LEXIS 155159 at pp. *9-*10 [addressing litigation expenses under § 2699; stating allowable expenses "should be requested by application to clerk" and deferring ruling "to allow Plaintiffs to . . . add these to their Bill of Costs"].) The other cases it cites do not require a memorandum, or are otherwise distinguishable. (See, e.g., *Aguirre v. Genesis Logistics* (C.D.Cal. 2014) 2014 U.S. Dist. LEXIS 184616 at pp. *3-*4 [addressing § 2699 costs, but not recovery method]; *Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 51-52 [affirming order denying motion to tax costs in wrongful termination case; noting memorandum of costs was filed].)

would have revealed counsel's obvious error. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 7:21, p. 7-11 [trial court "retains jurisdiction to award or tax costs after an appeal is taken"]; *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461 [appeal did not divest trial court of jurisdiction to consider fees and costs].) Counsel's remark at the ex parte hearing suggesting excusable neglect was established "because I don't do appeals" is troublesome. And this was not counsel's only mistake. We need not recount all the other errors; they are detailed in Scantibodies's reply brief. But we are mindful that the " 'abuse-of-discretion standard requires us to uphold a ruling which a reasonable judge might have made, even though we would not have ruled the same and a contrary ruling would also be sustainable.' " (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 428.)

Despite counsel's mistakes, counsel did ultimately file both a memorandum of costs and briefing that addressed section 473, and as discussed *ante*, Scantibodies did not establish prejudice. Having presided over a lengthy trial and extensive posttrial proceedings, the trial court was in the best position to evaluate the competing factual claims regarding Plaintiffs' counsel's actions. The trial court could reasonably decide it was appropriate to consider her "overall diligence," not focus on each individual belief or action. (See *LeDeit v. Ehlert* (1962) 205 Cal.App.2d 154, 170 [granting relief for untimely costs bill where there were multiple reasons for delay, including counsel's mistaken belief that stay resulted from notice of appeal; association with three institutions and closing out of his office; and " 'tremendous work load' "].) And Scantibodies does not dispute that the delay in filing the PAGA motion was complicated by the

unavailability of ex parte dates and its decision not to stipulate. Viewing the record as a whole, and deferring to the trial court's factual findings, we cannot say the trial court's ruling "exceeded the bounds of reason." (*Shamblin, supra*, 44 Cal.3d at p. 478.)

DISPOSITION

The order is affirmed. The parties will bear their own costs on appeal.

GUERRERO, J.

WE CONCUR:

AARON, Acting P. J.

DATO, J.